

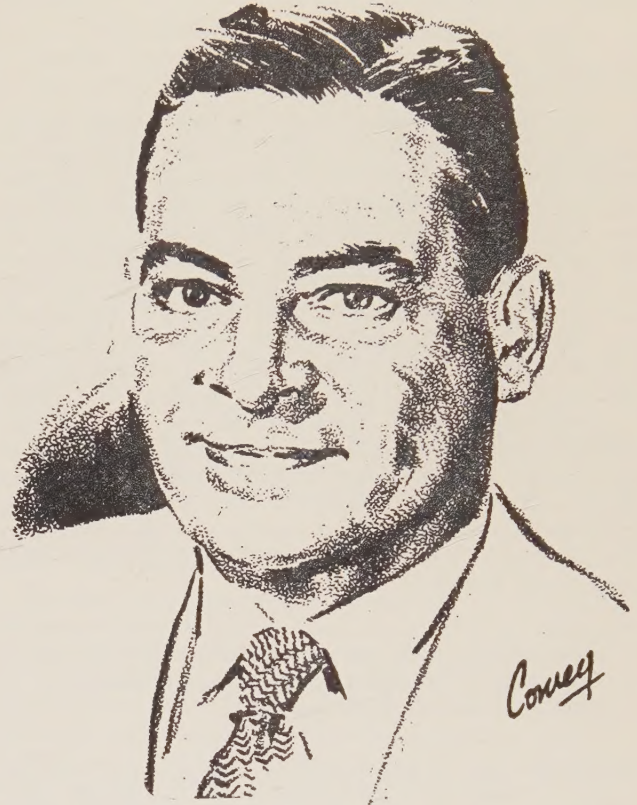


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SENATOR HENNINGS AND FOI

Senator Thomas C. Hennings, Jr., Democrat of Missouri, died in Washington on September 13, 1960. He was 57 years old. *The New York Times* said in an editorial: "Senator Thomas C. Hennings of Missouri was a fighter who had the respect of his opponents. Such respect genuinely given is rare—and it makes the man who commands it more effective than most fighters for causes. In his decade in the Senate, Thomas Hennings was effective in some important fights. He was a pivot in the minority group that defeated the 1954 effort to curb the President's treaty-making powers. He fought successfully against bills designed to hobble the Supreme Court. He put himself squarely in the path of movements to lessen freedom of the press, freedom to vote and other freedoms. His death at the age of 57 is a misfortune both for his friends and for the country." (9-15-60.)

This brief resume of Senator Hennings's efforts to increase the flow of information from government to the people has been prepared at the Freedom of Information Center.



Between January and June of 1950, a high government official was convicted of treason, an atomic scientist found guilty of espionage, and the United States went to war in Korea. Congress and the U.S. Supreme Court acted to protect the security of the country. A political belief was outlawed. President Truman revised his federal employees loyalty program of 1947. No longer were reasonable grounds to believe the employee disloyal necessary to dismissal; all that was necessary was a reasonable doubt of loyalty. It was in 1950, and the years immediately subsequent, that Senator McCarthy made news.

And these were the years whose damage to civil liberties—argue the contemporary necessity of the restriction of freedoms in behalf of national security as one will—soon or late had to be undone by the Congress and the Supreme Court. The tide began to turn in 1954-55. In retrospect, a piece of evidence to support the time and the turning is found in an Associated Press report for September 20, 1955: "Senator Hennings, Democrat of Missouri, announced today the Senate Subcom-

mittee on Constitutional Rights is soliciting opinion on whether free speech and press rights are being abridged." In November and again in the early spring of 1956, the Senate Subcommittee on Constitutional Rights, Senator Thomas C. Hennings, Jr., chairman, heard testimony on, to quote from the subtitle of an early hearings publication (3 parts), "... the extent to which the rights guaranteed by the First Amendment are being respected and enforced in the various government loyalty-security programs." The hearings indicated the rights were not being respected, that among the abrogations of the free speech and press clause was steady growth of a custom in government officials to deny wide, non-critical areas of information concerning government requested by citizens. It was a situation that was to concern Senator Hennings for the rest of his life.

But there were other concerns. The Hennings subcommittee's range of interest is grasped quickest by reference to the committee print *Publications Relating to the Work of the Subcommittee on Constitutional Rights* (1959). Hearings were conducted and reports entered on

the right to travel, passport policies of the government, use of wiretapping for evidence, treatment of juvenile delinquents, the interception of mail by the Post Office Department, and police methods of detention and obtaining confessions. Wherever inquiry ranged, often in the forefront of discussion, sometimes in the background, but rarely ever absent, was the problem of the people's right to know, seemingly so clearly stated in law, and against this right the government official's right to withhold knowledge for the people's welfare, not so clearly stated in law. Some sort of balance, clearly, must be struck — but how?

The First Freedom of Information Statute

The Hennings group began at the beginning by inquiring into the bases of authority under which government officials kept information secret from the Congress and the public, the same inquiry that was under way in the House of Representatives where it was pushed by the Subcommittee on Government Information, Rep. John E. Moss, chairman. The late Dr. Harold Cross, then serving in semi-retirement as legal counsel to the American Society of Newspaper Editors, aided the two committees in their work immeasurably. Important among the discoveries of this many-pronged inquiry — Dr. Cross is specifically credited — was that officials often claimed authority to withhold under an old statute providing for the physical care of federal records (section 161 of the Revised Statutes — 5 U.S.C. 22). On August 12, 1958, President Eisenhower signed into law an amendment to the old statute which, in the language of Senator Hennings, read simply:

This section does not authorize withholding of information from the public or limiting the availability of records to the public.

So Public Law 85-619 became the first — and remains (October 1960) the only — federal law specifically guaranteeing the right to know. (Critics called the law bland, negative, a stroke against the windmill, and adopted a so what attitude — which is another story.)

Another incubator of government secrecy was found in the Administrative Procedure Act of 1946 (5 U.S.C. 1002) whose original intent to expedite the flow of information from the federal government had been subverted to justify withholding of information. The act is rife with terms officials may — and often have, as the Hennings subcommittee documented — connote as authorizing secrecy; e.g., “any function . . . requiring secrecy in the public interest,” “for good cause shown,” “any matter relating solely to the internal management of an agency,” and “required for good cause to be held confidential.” Senator Hennings rewrote the specific sections of the act to clarify its purpose as an information statute. His first bill to amend the Procedure Act was before Congress in May 1957. This was S.186 which, as time passed and with it congressional sessions, became S.2148 and, finally, S.2780. Though Senator Hennings campaigned vigorously to get his bill before the bobtailed session that adjourned September 1, 1960, he failed and the bill remained with the Senate Judiciary Committee, parent body of the Subcommittee on Constitutional

Rights to whom the subcommittee had favorably reported the bill in January 1960.

It is to be noted that the Judiciary Committee had as chairman Senator James O. Eastland of Mississippi, a conservative in the area of civil liberties to put it mildly. So for the liberal chairman of the Subcommittee on Constitutional Rights it was from the beginning, as at the end, an uphill fight. That the subcommittee accomplished no more than it did must in indeterminate measure be credited to the main committee and its powerful chairman. Working without such wraps, as for example in his position as chairman of the Senate Rules Committee, Senator Hennings was accustomed to getting things done and his name is on some important pieces of legislation.

The Court Records Bill

Yet another Hennings freedom of information bill was before the Judiciary Committee at the time of his death. S.3183 was, in his words, “designed to combat unwarranted secrecy in federal judicial court records and proceedings.” The bill reads: “All records, books and dockets of any court of the United States, and all papers on file with any court of the United States, shall constitute public records and shall be open during office hours to inspection by any person without charge.” This would amend the United States Judicial Code which provides that civil actions in federal courts shall be open “unless the parties with the approval of the judge shall specifically agree to the contrary.”

The bill was precipitated by the action of four federal judges in Michigan who at the request of one of the parties closed the records on an embezzlement case that had excited considerable interest in Detroit (December 1959). Study subsequently indicated that since 1945 there had been nothing on the statute books concerning access to federal court records. The Judicial Code was revised that year, but the statute of some 150 years standing that provided for inspection of records was omitted in the revision, this being thought, Senator Hennings told a reporter, “a matter . . . more properly left to the rule of each court.”

His last piece of legislation to enforce the right of the citizen to know about government was in the plan stage at the time of his death. It would have been a federal public records statute, modeled on the best aspects of the state access to records statutes in the light of court decisions concerning them. In preparation for this the state record laws and decisions concerning them were gathered by the subcommittee. (These are available in the committee print, *Background Materials on a Comprehensive Federal Public Records Law [1960]*.) Certain to have had bearing on the formulation of the records law would have been the results of a survey commenced in June 1958 to determine what records of the federal departments and agencies — 96 queried — were not open to the public and press on request and why not. Survey results, published under the title *Withholding of Information from the Public and Press* (1960), showed the 49 departments that responded to be relying for withholding authority on over 80 statutes, a multitude of executive orders and administrative regulations, and several court decisions. “Chaos,” was the word Senator Hennings put to the situation, seeming to indicate he

thought no single piece of legislation would solve the problem entirely when he said "... a comprehensive federal public records law might help ..."

Executive Privilege, in Quotes and Out of Quotes

For Senator Hennings and the Subcommittee on Constitutional Rights, as has been the case for his counterpart in the House, Representative John E. Moss and his Government Information Subcommittee, all threads in the tangled skein of freedom of information led eventually to the principle of the separation of powers and to the question, as old as the republic, where, just where do these powers separate. In issue for freedom of information are the limits of the executive and legislative branches. How much can Congress ask of the President under the Constitution; how much can he refuse to give under the Constitution. The point in question here, the matter requested, the unknown quantity: information.

Senator Hennings commenced to query William P. Rogers as to his understanding of the claim of "executive privilege." Rogers was then, 1957, a deputy attorney general, but later, as the attorney general of the United States, he was firm in his large, all-inclusive claim for the privilege. It was his opinion that "... the President and heads of departments are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient." (The writings of Rogers on the matter are largely incorporated in the committee print, *The Power of the President to Withhold Information From the Congress* [1958-59].)

In testimony before the subcommittee in March 1958, Rogers said the presidential power to withhold information could be delegated to — and exercised by — anyone in the executive branch. (This set some worried observers to totaling up the number of hundreds of thousands working in the executive branch.) These thoughts Rogers subsequently communicated to President Eisenhower in memorandums, causing Senator Hennings to remark "... it almost seems the attorney general is attempting to amend the Constitution by writing memorandums." In a press release from his office, the Senator, generally held the best constitutional lawyer in the Senate, said, "... nowhere in the Constitution is the President or any of his subordinates given such broad and dangerous powers."

Clearly the battle lines were drawn. But Senator Hennings's health now was failing. Whatever the course of battle, if battle there is to be, he would have no part of it. He set forth his opinions on the matter in an article entitled, "The Executive Privilege and the People's Right to Know" (*Federal Bar Journal*, December 1958-

January 1959) which should be read with Dr. Cross's "The Myth of 'Executive Privilege'" for best understanding of the problem. He argued that even though the Constitution in its reference to separation of powers might be interpreted to authorize the President to withhold from Congress it could not be interpreted as authorizing withholding from the people. He agreed that over the years exercise of secrecy by the President had been sanctioned in practice and by Supreme Court rulings where in matters of defense and foreign affairs it was clearly essential to the best interests of the country. He concluded:

... the President's power to withhold information from the public is indeed an executive "privilege" — not a right — which has relatively narrow limits. Circumscribed as it is by the protections afforded the people's right to know in the Constitution, particularly in the free speech and press clause of the First Amendment, and limited further by the protection afforded First Amendment rights under the "preferred position" doctrine, the executive privilege to withhold information from the public would seem to exist only in cases where it is necessary in the effective exercise of another executive power and where divulgence of information would constitute a "clear and present danger" to the national interest. In the absence of enabling legislation by the Congress, information may be withheld by the President only when these two tests are met.

The Fol Program of Senator Hennings

Senator Hennings detailed his program for alleviating restrictions on freedom of information about government activities in "Secrecy — Threat to Freedom," an article he wrote for *The Progressive* (April 1959). The program, breaking into four parts, called for amendment of the Administrative Procedure Act, formulation of a "Code of Executive Privilege" to serve as "a working guide in determining when the executive branch might properly withhold information ... under the Constitution," development and passage of an access to federal records law, and, lastly, for continued surveillance by Congress, through its investigative power, of the information practices of government.

Excepting congressional inquiry, in which he had played so large a part, Senator Hennings lived to see none of his programs realized. Whether or not his program is ever to be fleshed will rest with the Congress and the extent to which it is interested as he was, in his words, "... in helping the people to obtain accurate and timely information."

Columbia, Missouri
October 1960

